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IN THE SUPREME COURT OF THE  
UNITED STATES

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE  
SUPREME COURT OF CALIFORNIA

BRIEF OF THE STATE OF WISCONSIN  
AS AMICUS CURIAE

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BRIEF OF THE STATE OF WISCONSIN  
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INTEREST OF THE AMICUS CURIAE

The Wisconsin Legislature by the  
enactment of Wis. Stats. ch. 199,<sup>1/</sup>

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<sup>1/</sup> The Citizens Utility Board Act,  
ch. 72, 1979 Wis. Laws 457.



effective November 29, 1979, chose to facilitate consumer involvement in the utility regulatory process through the creation of a new public entity, the Wisconsin Citizens Utility Board (hereinafter "Wisconsin CUB"). The Wisconsin CUB was created as a "nonprofit public body corporate and politic" Wis. Stats. sec. 199.04(1)(1983-84) with the explicit intent that it represent consumer interests in utility proceedings.

The purpose of this chapter is to promote the health, welfare and prosperity of all citizens of the state by ensuring effective and democratic representation of individual farmers and other individual residential utility consumers before regulatory agencies, the legislature and other public bodies and by providing for consumer education on utility service costs and on benefits and methods of energy conservation. Such purpose shall be deemed a statewide interest and

not a private or special concern.

Wis. Stats. sec. 199.02(1983-84).

The corporation shall:

a. Represent and protect the interests of the residential utility consumers of the state. All actions by the corporation under this chapter shall be directed toward such duty.

b. Inform, insofar as possible, all residential utility consumers about the corporation, including the procedure for obtaining membership in the corporation.

c. Make available to all residential utility consumers information on utility service costs and on benefits and methods of energy conservation.

Wis. Stats. sec. 199.05(1)(1983-84).

The Wisconsin CUB is authorized to intervene as a party in regulatory proceedings and to represent consumer interests before legislative and other public bodies, Wis. Stats. sec.

199.05(2)(d)(e)(1983-84). The organization is governed by a Board of Directors with the requirement that there be two directors from each congressional district, Wis. Stats. sec. 199.06(1983-84). Directors are nominated and elected by membership in a procedure specified by law, Wis. Stats. sec. 199.12(1983-84). Every Wisconsin adult residential utility consumer is eligible for membership in the Wisconsin CUB and funding is to be provided through membership fees and donations, Wis. Stats. sec. 199.04(1) and 199.05(2)(c)(1983-84).

The Legislature has provided that information describing the "purpose, nature and activities" of the Wisconsin CUB is to be distributed in periodic utility billings. The Wisconsin CUB enclosure may solicit contributions but may not have the character of a bill,

statement of account or personal correspondence, Wis. Stats. sec. 199.10(1)(d)(1983-84). No utility may be required to distribute such material more than twice per year and the material must be provided to the utility not less than 21 calendar days before the billing cycle, Wis. Stats. sec. 199.10(1)(a) and (2)(b)(1983-84).

The enclosure material must be compatible with the utility's mail envelope and may not exceed one half ounce in total weight, Wis. Stats. sec. 199.10(1)(b)(1983-84). In the event that the enclosure causes the total weight of the utility billing to exceed one ounce, the Wisconsin CUB is required to reimburse the utility for mailing cost in proportion to the weight of its enclosure. Moreover, the Wisconsin CUB is obligated to reimburse the utility

with interest for any reasonable costs incurred above the utility's normal mailing costs, Wis. Stats. sec. 199.10(3) (1983-84).

The enclosure must be submitted in advance for approval by the Wisconsin Public Service Commission (hereinafter "Wisconsin PSC") to assure that it is not false or misleading, Wis. Stats. sec. 199.10(2m) (1983-84).

The Wisconsin CUB, over the past five years, has grown to over 118,000 members and has become an active participant in the Wisconsin regulatory process. In 1984 the Wisconsin CUB participated in 27 regulatory proceedings

before the Wisconsin PSC<sup>2/</sup> and three circuit court actions.<sup>3/</sup>

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2/ Wisconsin Bell refund, Dkt. 6720-TI-3; Usage Sensitive Service, Dkt. 2180-TR-18; Access charges, Dkt. 05-TR-5; Wisconsin Bell Yellow Pages, Dkt. 6720-AT-6; Party Line, Dkt. 6720-TA-100; Cost-of-Service Study, Dkt. 05-TI-8; Regulatory Authority, Telecommunications, Dkt. 05-TI-100; Post-Divestiture Inquiry, Dkt. 05-TI-6; Local Disconnection, Dkt. 1-AC-101; Mobile Unit Access Charges, Dkt. 05-TR-4; MCI Authority, Dkt. 3258-NC-1; Wisconsin Power & Light, Rates, Dkt. 6680-UR-14; Wisconsin Power & Light, Fuel Costs, Dkt. 6680-UR-15; Wisconsin Electric Power, Rates, Dkt. 6630-ER-19; Wisconsin Public Service, Rates, Dkt. 6690-UR-20; Wisconsin Public Service, Cogeneration, Dkt. 6690-DR-100; Wisconsin Gas, Rates, Dkt. 6650-GR-19; Wisconsin Natural Gas, Rates, Dkt. 6670-GR-11; Madison Gas & Electric, Rates, 3270-UR-13; Electric Load Growth, Dkt. 05-EI-15; Cost of Fuel, Dkt. 1-AC-59; Cold Weather Disconnection, Dkt. 1-AC-29; Early Identification Programs, Dkt. 05-UI-17; Mandatory Budget Billing, Dkt. 1-AC-62; Rental Living Unit Seal, Dkt. 6650-UC-1; Holding Company Investigation, Dkt. 05-UI-18 and 6650-DR-2; Utility Advertising Rules, Dkt. 1-AC-60.

3/ CUB v. PSCW, Dane Cty. Cir. Ct., Case Nos. 84-CV-0314, 84-CV-0315 and 84-CV-0316; CUB v. PSCW, et al., Dane Cty. Cir. Ct. Case No. 84-CV-4243; Northeast Telephone Co., et al. v. PSCW, (Footnote continued)



The Wisconsin PSC has historically regulated closely the process by which each utility bills its ratepayers. The form and content of each billing is specified in great detail in the Wisconsin Administrative Code, Wis. Adm. Code, sec. PSC 113.16 (electric), sec. 134.13 (gas) and sec. 165.05 (telephone). Wisconsin law also requires that any utility which applies for a general rate increase must provide through its billing process notice of the application to all affected customers together with an explanation of its general effect, Wis. Adm. Code, sec. PSC 2.73. Finally, the WPSC has never hesitated to use this readily available, ratepayer-funded means of communication to disseminate useful information related

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et al., Brown Cty. Cir. Ct., Case No. 84-CV-2793.

to the regulatory process generally. Recent examples include information relating to disconnection procedures, budget billing and procedures for disputing a bill.

This appeal is a challenge to an order of the California Public Utility Commission (hereinafter "CPUC") which authorized a consumer organization to distribute information relating to the group's participation in the regulatory process using the periodic billings of the appellant utility. Amici Wisconsin State Telephone Association and Wisconsin Bell, Inc. (hereinafter "WSTA") have suggested that this appeal challenges in substance the Wisconsin statute that expressly authorizes periodic distribution of consumer information on behalf of the Wisconsin CUB. The result advocated by the appellant would diminish



substantially the ability of a state regulatory commission to regulate the relationship between a utility monopoly and its ratepayers. It would seriously impair the ability of a commission to facilitate consumer participation in its own legal process. Similarly, the arguments offered by WSTA represent an effort to reduce significantly the power of a state legislature to encourage participation on the part of consumers in the regulatory process. The State of Wisconsin appears amicus curiae in support of the CPUC to urge that this challenge to fundamental state sovereignty be rejected.

#### SUMMARY OF ARGUMENT

The promotion of consumer participation in the regulatory process is a proper and substantial state

interest. The order of the CPUC is a proper exercise of state authority to promote effective consumer participation. The order properly makes limited use of the utility billing mechanism simply to assure that an additional voice is heard but does not infringe upon the utility's ability to communicate with rate-payers.

#### ARGUMENT

##### **I. An Intervenor Organization Which Participates In The Regulatory Process On Behalf Of Consumers Performs A Valuable Public Function.**

Public utilities are subject to comprehensive regulatory control and, in turn, enjoy exclusive franchise to provide utility service within designated areas. Each public utility is truly a state-created monopoly and the reality is that virtually every residential consumer

has no choice but to purchase each utility service from a single source. The rationale for utility regulation is the need to protect rate-payers who must deal with a monopoly utility for vital service, Consolidated Edison v. Public Service Commission, 447 U.S. 530, 549-550 (1980).

Utility rate setting before the CPUC involves a complex proceeding in which interested parties have the right to present evidence and argument. Cal. Pub. Util. Code, sec. 1705. The primary purpose of the utility regulation is the protection of public Sale v. Railroad Commission (1940), 15 Cal. 2d 612, 104 P.2d 38 but the commission risks a violation of due process if it fails to maintain an impartial demeanor in that process, Morgan v. United States, 304 U.S. 1, 22 (1937). There exists a

dichotomy in that a state may properly seek to protect ratepayers from exploitation by utility monopolies but a regulatory commission must maintain an essentially neutral posture as the decision maker in an adversarial hearing.

Certainly residential ratepayers share a vital stake in the decisions that are made before a state regulatory commission. There is, however, little or no real opportunity for individual consumers to play a meaningful role in such a proceeding. The TURN organization provides to prospective members an opportunity to participate in the regulatory process and in so doing it assists the commission in discharging its public responsibilities. The CPUC has determined TURN's participation to be of real value.

TURN has demonstrated in its testimony and in its past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population.

There is no question that participation by representatives of consumer groups tends to enhance the record of our proceedings.

CPUC Decision No. 83-12-047 (A-19).

29. Participation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff.

CPUC Decision No. 83-12-047, Findings of Fact (A-36).

The foregoing determination by the California PUC is the full equivalent to the determination by the Wisconsin legislature that the activities of the Wisconsin CUB serve a public, state-wide purpose, Wis. Stats. sec. 199.02.

Active representation of residential consumers at hearing provides balance and contributes additional information to assist the Commission in reaching its decision. Perhaps of equal significance is the likelihood that independent, vigorous representation of consumer interests will enhance public perception that both sides of a rate question are indeed being fairly considered in the regulatory process. The Wisconsin CUB is a public entity intended to serve a specific public role in the regulatory process. The TURN organization, in its advocacy before the CPUC, fills a substantially parallel role that is truly public in character.



**II. The Use Of The Utility Billing Mechanism To Distribute Consumer Information Relating To The Regulatory Process Is A Reasonable, Proper Way To Facilitate Consumer Participation In That Process.**

Utility regulation is intended to monitor and to control the non-market relationship between the public utility and its rate payers. The periodic utility billing is an integral part of the service provided by each utility. This regular contact between the utility and its customers has long been subject to careful control by the CPUC and has often been used to communicate useful information of public significance to rate-payers including notice of Commission proceedings (Motion to Dismiss, at 11 and A-7).

Just as TURN and the Wisconsin CUB each represent an opportunity for consumers to participate in the regulatory process, the billing envelope offers the most direct and effective means of communicating with utility customers. Clearly a customer's interest and concern about utility matters will rarely be greater than at the moment that the demand for payment is received. Indeed, one Wisconsin utility has conducted a survey which demonstrated the bill enclosure to have been far and away the most effective method of



communicating an energy conservation message.<sup>4/</sup>

The bill enclosure has long been used to communicate regulatory information beyond the basic demand for payment. Materials that have been included in billings, certainly notices of rate increases and hearings, were clearly intended to facilitate consumer awareness and participation. If a

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<sup>4/</sup> The Madison Gas & Electric Company conducted a survey to identify the proportion of customers who could recall seeing MG&E energy conservation advertising and, if so, to identify the medium of communication. The rates of positive response, by media, were as follows:

Newspaper	41%
Radio	32%
Television	68%
Bill Stuffer	81%

MG&E Customer Conservation Survey Report,  
October, 1983

distinction can be drawn between the previous use of the billing enclosure and its use by intervenor groups, it is that the use now in question appears to bring forth effective consumer participation as a fact rather than as a theoretical possibility.

The CPUC by order, and the Wisconsin Legislature by statute, have done no more than make limited, reasonable use of The most obvious, direct and efficient means to invite consumer involvement in the legal process where consumer interests are directly at stake.

**III. The Distribution Of  
Wisconsin CUB Information  
Through The Billing  
Envelope Has Been An  
Accepted Part Of The  
Wisconsin Regulatory  
Process For Five And One  
Half Years.**

Wisconsin utilities have been operating under the requirement to

distribute Wisconsin CUB information since November 29, 1979. WSTA is therefore entirely correct in saying that Wisconsin utilities have had considerable experience in the actual operation of the statutorily authorized distribution of intervenor materials (Brief, p. 4). The fact is, however, that this limited distribution of additional information has caused no particular difficulty during that period. It is true that WSTA, after this Court noted probable jurisdiction in this appeal, filed an action claiming that the distribution

requirement is in violation of the First Amendment.<sup>5/</sup> It is equally true,

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<sup>5/</sup> Wisconsin State Telephone Ass'n et al. v. Citizens Utility Board, U.S. District Court, Case No. 85-C-0821 (E.D. Wis. filed May 30, 1985). The WSTA suggests in its newly filed lawsuit that an informal communication by Chairman Flores of the Wisconsin PSC has inhibited utilities from responding to Wisconsin CUB enclosures. Wisconsin Bell, Inc. has never been reluctant to defend its prerogatives and the current efforts to do so exemplify the "hardy" quality of commercial speech, Central Hudson Gas v. PSC, 447 U.S. 557, 564 n. 6 (1980). Moreover, Wisconsin utilities have continued to insert responses to Wisconsin CUB enclosures. Wisconsin Electric Power Company, billing cycle beginning April 15, 1985; Wisconsin Power & Light, billing cycle beginning May 13, 1985.

however, that Wisconsin Bell and every other utility subject to the statute saw no need to challenge the law until now.<sup>6/</sup> One might infer from the timing of the recent lawsuit that it is primarily intended to obscure the fact that the statute in question has from its creation been accepted as a reasonable part of the Wisconsin regulatory process.

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<sup>6/</sup> There has been only a single lawsuit filed based upon the Wisconsin Citizens Utility Board Act other than the recent challenge noted above. In Citizens Utility Board v. Wisconsin Bell, Inc., Case No. 84-CV-4693, the Dane County Circuit Court granted summary judgment for the Wisconsin Bell Inc. on June 13, 1985 directing the Wisconsin CUB to pay the sum of \$2,017.04 as proportional mailing costs pursuant to Wis. Stats. sec. 199.10(3) (1983-84).

**IV. The Appellant Seeks To Diminish The Authority Of A State To Define The Legal Process By Which Utilities Are Regulated.**

The CPUC has not impaired the ability of PG&E to communicate its message in the billing envelope. Clearly, PG&E has the right to provide its Progress publication to its customers in any and every monthly billing. It is PG&E that demands to exclude from this means of communication information that the Commission has determined will assist in the regulatory process. PG&E argues that its right to speak to customers should be permitted to swell into a prerogative to exclude speech of others. To accept this claim is to undercut the fundamental authority of a state commission to regulate the relationship between a monopoly utility and its captive ratepayers. To accept the claim



when the communication in question is one that the CPUC has determined to be an aid to its regulatory decision-making is to permit a profound diminution of the state's authority to promote full participation within its own regulatory process.

PG&E asserts that it is "highly likely that the public will receive a mistaken impression that the state's selection of TURN to send its message in the billing envelope is supported by PG&E" (Brief at 19). This court in Pruneyard Shopping Center v. Robins, (1980) 447 U.S. 74, recognized that a simple disclaimer would be entirely adequate to resolve this problem in the context of a public shopping center, at 87. Here, the CPUC order resolves any problem by explicitly requiring TURN to include the disclaimer as part of its

disclosure (CPUC Decision, Order 5(e), Motion to Dismiss, App. A-39). In any event, the Wisconsin CUB enclosures which appear in the appendix of WSTA make clear the improbability of any confusion (WSTA, App. 7-a to 18-a). These enclosures are obviously statements of advocacy. No individual sufficiently interested to read them could be left with the impression that they were endorsed by any utility.

A basic premise underlying the PG&E argument is the idea that its relationship with its ratepayers is no different than any other commercial dealing. In fact it is a non-market relationship that has long been subject to extensive state regulatory control. PG&E describes TURN as a private entity (Brief at 14 n. 12) while WSTA describes TURN as a "professional intervenor"



(Brief at 10). Both characterizations fail to recognize the public character of TURN's participation before the CPUC. The Commission has determined that TURN's involvement benefits both ratepayers and the Commission itself. The TURN enclosure is but the initial element in a process which the CPUC has determined will promote greater participation and more complete consideration of issues at hearing. The enclosure serves a significant public purpose and the California order is squarely within the scope of traditional state authority.

#### CONCLUSION

This Court should affirm the judgment of the California Supreme Court

affirming the CPUC's decision number 83-12-047.

Respectfully submitted,

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